CENTRAL MALAYSIAN FINANCE BHD. v. V. LETCHUMANAN

[O.C.J. (Mohamed Azmi J.) January 25, 1979]
[Kuala Lumpur — Originating Summons No. 388 of 1975]

Land Law — Charge — Loan of $900,000 utilised by instalments — Foreclosure — National Land Code, s. 254(1).

The respondent had charged his land with the applicants to secure a loan of $900,000 with interest. The sum was in fact utilised by the respondent in instalments. The applicants applied for an order of foreclosure. It was argued (a) that the contract was unenforceable as although the charge stated that the loan was made on a certain date, in fact the payment was made in instalments subsequent to the execution of the charge; (b) that in the circumstances there should have been six separate charges for each of the six instalments and (c) that the chargee had not complied with section 254(1) of the National Land Code by its failure to specify the breach.

Held: (1) the chargee was carrying on business under the Borrowing Companies Act, 1969 and was not bound by section 16 of the Moneylenders Ordinance;

(2) the chargor did in fact receive a loan of $900,000 on the date of the execution of the charge, although he chose to utilise the loan by instalments on subsequent dates;

(3) in this case the breach had been sufficiently specified, that is, failure of the chargor to make the monthly payments in accordance with the loan agreement annexed to the charge.

Cases referred to:-

(1) *Overseas Union Finance Ltd.* v. *Lim Joon Chong* [1971] 2 M.L.J. 124.

(2) *Webb* v. *Stenton & Ors.* (1883) Q.B.D. 518, 527.

ORIGINATING SUMMONS.

Nik Mohamed Din for the applicant.

N. Ramachandran (*P. Devadas* with him) for the respondent.

Mohamed Azmi J.: This is an application by originating summons by Central Malaysian Finance Bhd. (the chargee) for order of foreclosure against V. Letchumanan (the chargor) in respect of the chargor's land held under Certificate of Title No. 2752 Lot 4145 in the Mukim of Pilah in the State of Negeri Sembilan, which was charged to the chargee *vide* Charge Presentation No. 3701-73 Volume 122 Folio 57 to secure a loan of $900,000 with interest. The application is made under section 256 of the National Land Code to satisfy a sum of $1,109,020.04 which was due and owing on the charge as at September 4, 1973. Notice in Form 16D of the National Land Code was served on the chargor on July 31, 1975 together with notice of demand.

By paragraph 5 of the chargor's affidavit sworn on June 28, 1976, he admits executing the charge, but contends that the charge does not correctly represent the real nature of the dealings or transactions made between the parties. He admits receiving various sums totalling $792,000 from the chargee, but denies receiving the sum of $900,000 as contained in the charge. He also alleges that the notice in Form 16D is also bad in law as it was not properly served on him.

It is not disputed that the chargee is a borrowing company carrying on business under the Borrowing Companies Act, 1959. By paragraph 4 of Mr. Michael Chua Chon Kow's affidavit sworn on September 2, 1976, it is averred that the chargee was ready and willing to release the whole sum of $900,000 to the chargor; but at the chargor's request, the whole sum was not released at once, but were released by six instalments by separate cheques; and the principal sum plus interest due and owing as at June 30, 1976 was $1,209,616.80. As regards service of notice under section 254 of the National Land Code, it is averred that the service was good in accordance with section 431 of the Code. These averments are disputed by the chargor in his second affidavit sworn on September 18, 1976.

Since the sum of $900,000 was paid by instalments, it is argued by counsel for the chargor that as at the date of the charge the debt was not $900,000 and there was no existing obligation to pay this sum when the charge was executed. It follows from the non-payment of the whole $900,000 on the same day, that paragraph (a) in the charge should not have been used. (See Form 16A of the National Land Code). It is suggested that either paragraph (b) of Form 16A should have been used, or a fresh charge should be executed for each of the six instalments. In short, there should have been six separate charges, each securing the actual amount paid by the chargee to the chargor on that particular instalment.

The second argument advanced on behalf of the chargor is that the chargee has not complied with section 254(1) of the National Land Code by its failure to specify the breach. Further, in the letter "CMF 3", it talks of the chargor's failure to pay on demand of the whole sum of $900,000; and whereas the Form 16D talks of the chargor's failure to make monthly payment in accordance with clause 1 of the agreement.

Finally, it is contended on behalf of the chargor that the procedure adopted by the chargee is wrong. The claim should be by writ and not by foreclosure proceedings. Since the moneylending was in fact by instalment and not in a lump sum as stated in the loan agreement, this constituted a material error which tended to mislead and made the contract unenforceable on the authority of *Overseas Union Finance Ltd.* v. *Lim Joo Chong.*[1]

Taking the third argument first, I agree with the learned counsel for the chargee that there is material distinction between *Overseas Union Finance Ltd.* case and the present case. In that case, the memorandum of agreement for the loan was drawn up pursuant to section 15 of the Moneylenders Ordinance, 1951. There was a non-compliance of section 16(3) of the Ordinance on the ground that the memorandum stated that payment of the loan was to be made on a certain date when in actual fact the payment was made in various amounts on different dates subsequent to the execution of the memorandum of agreement. In the present case, the chargee is carrying on business under the Borrowing Companies Act, 1969; and pursuant to section 7 of the said Act, a licence was issued to it effective from December 1, 1970. (See Exhibit "MC 1" attached to Mr. Michael Chua Chon Kow's affidavit dated September 2, 1976). Provisions similar to section 16 of the Moneylenders Ordinance are absent in the Borrowing Companies Act (Act 6).

As regards the first argument, I am of the view that as on the date of execution of the charge, the

chargor did in fact receive a loan of $900,000. He borrowed this sum and charged his land to the Finance Company as security for repayment of the loan together with interest at 12% per annum. From clause 1 of the loan agreement annexed to the charge, the loan is repayable on demand, and, until such demand, the chargor shall repay the loan with interest by four equal six monthly instalments, the first to be made on or before the last day of the twelfth month and the subsequent instalments to be paid on or before the respective last days of the eighteenth month, the twenty-fourth and the thirtieth month. There is a proviso to clause 1 which states:

"PROVIDED ALWAYS that the Chargee shall be at liberty and is hereby expressly authorised by the Chargor to advance or pay the whole of the Loan and or such part or parts thereof to such person or persons at such times in such manner by such amounts and upon such contingencies and conditions as the Chargee may in its absolute discretion decide AND it is hereby expressly acknowledged agreed and confirmed by the Chargor that all advances and payments to such other person or persons as aforesaid shall for all purposes whatsoever be deemed to be and form part of the moneys secured by and owing under this Charge and the acknowledgement or receipt of such person or persons shall be as good and sufficient and effective as if the same had been made or given by the Chargor personally."

The loan of $900,000 having been finalised on the date of execution of the charge (September 14, 1973), I am of the view that having regard to the provisions of the loan agreement, interest on the loan is chargeable from that date irrespective of whether any part of the loan was utilized by the chargor. The $900,000 had been made available by the Finance Company for the chargor and all the loan or any part of it could be released at any time and to whoever person the chargor might direct. In the circumstances, I am of the view that even if none of the loan of $900,000 had been actually utilized by the chargor, there was already a debt of $900,000 due from the chargor to the chargee on the date of execution of the charge and the loan agreement, provided such non-release was at the request of the chargor. The debt was incurred on September 14, 1973, and the Finance Company was merely keeping the money as agent for the chargor; and the fact that the chargor had decided not to utilize the whole loan at once but by six stages, does not alter the date of the loan, and does not alter the nature of the loan into six separate loans. In this case, the chargee was not only ready and willing to release the whole loan of $900,000 to the chargor, but was under legal obligation to release the whole sum when the charge and loan agreement were executed on September 14, 1973; and on the balance of probabilities, I accept the averment of Mr. Michael Chua Chon Kow in his affidavit that it was at the request of the chargor himself that the loan was released by six instalments in the following manner: —

14.9.1973	—	$225,000
9.10.1973	—	25,000
12.10.1973	—	450,000
15.1.1974	—	70,000
11.2.1974	—	50,000
15.2.1974	—	80,000
Total	—	$900,000

On the facts and the law, it cannot be said that on the date of the charge there was no debt of $900,000 but only $225,000. It is true that in the charge document (Form 16A) paragraph (a) was used, which stated that the chargor acknowledged the receipt of the loan of $900,000 from the chargee. This merely confirms that the loan of $900,000 was created on that date, i.e. such loan had been offered and accepted. It is, however, up to the chargor to decide when and in what manner the loan was to be utilized. As far as the Finance Company is concerned, $900,000 had been allocated for the use of the chargor as on the date of the charge, and interest was payable in accordance with the terms of clause 1 of the loan agreement. In my view, there is no legal necessity in the present case to have six separate charge documents. Once a charge for $900,000 had been executed, there is no legal requirement to execute separate charges for the separate amounts that the chargor had decided to utilize the loan. When and how the loan was to be utilized are matters entirely within the power of the chargor and they have nothing to do with the chargee. The case of *Webb* v. *Stenton & Ors.*[2] does not seem to have any application in the present foreclosure proceedings. The Court of Appeal in that case was dealing with attachment of debts under Order IV rule 2, and the question in issue was whether there was a "debt" capable of being attached.

As regards the second argument, I am of the view that the allegation that the chargee has not complied with section 254(1) of the National Land Code is without merit. To my mind, the breach has been sufficiently specified in the statutory notice in Form 16D, i.e. failure on the part of the chargor to make monthly payments in accordance with clause 1 of the loan agreement annexed to the charge. The letter dated August 1, 1975 forwarding the statutory notice is not required by law; and if there is any discrepancy between the two documents, the contents of the statutory notice must prevail. The breach in the statutory notice clearly refers to clause 1(a)(ii) which provides:

"Until the payment of sum stated in (i) above the Chargor shall pay interest on the Loan at the Interest Rate on the 14th day of every month, the first of such payment to be made on the 14th day of October, 1973."

Failure to comply with clause 1(a)(ii) is a default within the meaning of clause 5 of the loan agreement.

In the event. I allowed order in terms of the chargee's originating summons and fixed the auction sale on December 20, 1976 to realise the sum of $1,209,616.80 — the amount due as at June 30, 1976.

Order accordingly.

Solicitors: *Mah-Kok & Din; Devadas & Co.*